No. 15812

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLORENCE UMBRIACO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORENCE UMBRIACO,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANT

JOHN F. EVICH
Attorney for Appellant Florence Umbriaco

1903 Smith Tower
Seattle 4, Washington

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INDEX

Page

Statement of Jurisdiction 1

Statement of the Case 2

Specification of Errors 5

Argument:

Specification I 6

Specifications II and III 10

Conclusion 17

TABLE OF CASES

Allen v. United States, 194 F.664 (C.A. 5) 9, 13

Cuesta v. United States, 230 F.(2d) 704 11

Clayton v. United States, 284 F. 540 16

Dato v. United States, 223 F.(2d) 309 12

Fotie v. United States, 137 F.(2d) 831 (C.A. 8) 9

Hammer v. United States, 271 U.S. 620 13

Hart v. United States, 131 F.(2d) 56 (C.A. 9) 9, 15

McWhorter v. U. S., 193 F.(2d) 982 15

People v. O'Donnell, 132 C.A.2d 840, 283 Pac. (2d) 714 11

Radomsky v. United States, 180 F.(2d) 781 (9 C.A.) 10

Smith v. United States, 169 F.(2d) 118 9

Spaeth v. United States, 218 F.(2d) 361 11

United States v. Hiss, 185 F.(2d) 822 15

United States v. Neff, 212 F.(2d) 297 ..... 12, 15, 16

TABLE OF CASES

Page

United States v. Otto, 54 F.(2d) 227 (C.A. 2) 13
United States v. Slutzky, 79 F.(2d) 504 9
United States v. Wood, 14 Pet. 430, 10 L.ed. 527 13
United States v. Rose, 215 F.(2d) 617 ..... 9, 12
Weiler v. United States, 323 U.S. 606 13

TEXT BOOKS

10 Am. Jur., 1071, Sec. 1218 14
39 L.R.A. (N.S.) 385 13
I Wigmore, Comm. on Evid. 399 14
Words and Phrases, 34A 6

STATUTES

Section 1621, Title 18, U.S.C. 1
Section 2421, Title 18, U.S.C. 2
Section 3231, Title 18, U.S.C. 2
Section 1291, Title 28, U.S.C. 2

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BRIEF OF APPELLANT

JURISDICTION

The appellant, Florence Umbriaco, testified as a witness in the case of *United States of America v. Frank Umbriaco,* in the U.S. District Court and was thereafter charged by indictment with two counts of perjury (Tr. 3) for the alleged violation of Section 1621, title 18, U.S.C.

Section 3231, title 18, U.S.C. vests original and exclusive jurisdiction of all offenses against the laws of the United States in the District Courts of the United States.

Section 1291, title 28, U.S.C. places jurisdiction of appeals from all final decisions of the District Court in the Court of Appeals.

STATEMENT OF THE CASE

The appellant, Florence Umbriaco, was called as a witness for the plaintiff in the case of *United States v. Frank Umbriaco,* who was being tried on charges of White Slave traffic act, title 18, U.S.C. Sec. 2421.

Appellant was charged, tried and convicted in the U.S. District Court, Western District of Washington, Northern Division, for the crime of perjury alleged to have been committed in the trial of *United States v. Frank Umbriaco.*

In Count I, appellant is alleged to have stated on April 3, 1957, under oath (Tr. 3: (a) that during the 8-month period from June 1952 to February 1953, she did not operate as a prostitute at the Stewart Hotel in Seattle, Washington, and that during the same period she did not perform any acts of prostitution at the Stewart Hotel.

In Count II, appellant is alleged to have stated on April 3, 1957, under oath (Tr. 4):

(a) That during the period from September, 1954, to December, 1955, she did not operate as a prostitute. The evidence offered by the Government is as follows:

Condie M. May, clerk of the Stewart Hotel, identified plaintiff's exhibit 3, which is a partial record of guests at the hotel (Tr. 17) and that record showed Frank and Mrs. LaMar were registered at the hotel from June 19 to June 24, 1952 (Tr. 17, Pl. Ex. 3).

Walter Hass testified that he was a bellman at the Stewart Hotel and had been a bellman there for "going on seven years" (Tr. 19); that he worked the night shift, that he knew the defendant as Florence LaMar; that he called her to come down to the Hotel, that he had a deal for her, that she did come down to the Stewart Hotel (Tr. 20), that he took her to the room, did not enter, next saw her in the elevator (Tr. 2).

Marius Martell testified he was a bellman at the Stewart Hotel seven years, met the defendant (Tr. 25), called the defendant because somebody wanted a girl, met her at the Hotel, gave her a room number and she left (Tr. 28), saw her half an hour later. He called her about two weeks later (Tr. 29), and when she came

down from upstairs, said "there was nobody there" (Tr. 30).

Edward J. Denny testified he was a bellman at the Hungerford Hotel, met defendant in August, 1954, knew her as Flo, called her five or six times (Tr. 34, 35).

Mr. Campbell testified he was a janitor at the Washington Athletic Club, knew the defendant, met her near end of 1953, knew her four years, knew her between September, 1954, and December, 1955, had sexual intercourse with her for money (Tr. 40, 41).

Thomas Hutchings testified that he was a bellboy at Morrison Hotel three and one-half years knew the defendant, called her about three or four times (Tr. 45, 46).

Alfred Gunn testified he was an F.B.I. agent, met defendant at F.B.I. office in Seattle, that defendant admitted she worked as a prostitute during period at Stewart Hotel and during period charged in Count II (Tr. 52, 53).

Vernon P. Coyne testified he was a special agent for the F.B.I., met the defendant June 12, 1957, at George's Cafe; Special Agent Breen was there; defendant admitted practicing prostitution (Tr. 60, 61). Edward Leo Breen, Jr., testified he met defendant at George's Cafe

on June 12, 1957; defendant admitted being a prostitute (Tr. 68).

At the close of the evidence, defendant moved for a motion of acquittal as to both counts. Jury found the defendant guilty on both counts (Tr. 5), and on the 23rd day of September, 1957, the court granted the motion of acquittal as to CountI, but denied it as to Count II (Tr. 6).

SPECIFICATION OF ERRORS

The appellant specifies the following errors upon which she relies to reverse the judgment and sentence.

I. The evidence was insufficient to sustain the charge of perjury for the reason that the answers were legally truthful.

II. That the entire evidence of the plaintiff was purely circumstantial and no direct and positive evidence to the alleged falsity of defendant's testimony was produced and said evidence was therefore insufficient as a matter of law to sustain a verdict of guilty.

III. That the verdict is contrary to law and the evidence.

ARGUMENT

Assignment I.

The evidence was insufficient to sustain the charge of perjury for the reason that the answers were legally truthful.

In Count II appellant is charged with making false statements.

That during the period from September, 1954, to December, 1955, she did not operate as a prostitute. This period is covered on her return from Eureka, California, when she moved into the Stewart Hotel for a few days in the Fall of 1954, and then moved to 11th Ave. North for about one year and the Roygate Apartments four or five months (Pl. Ex. 2, pg. 14, 15).

The precise question "Did you operate as a prostitute?" is a question calling for a conclusion. To operate as a prostitute may mean one thing to one person and something different to another. In order to convict a person of being a prostitute the elements of what constitute prostitution must be proved. Prostitution has been defined in various ways by various cours. Words & Phrases 34A. We must therefore examine defendant's entire answers in order to arrive at her guilt or innocence. If her answers amount to an admission of the

elements of prostitution, then she is innocent of the charge in Count II. Earlier in her testimony (Pl. Ex. 2, page 52) she answered:

> "A. No, I had a friend of mine a couple of times that came up to visit me there, but it wasn't an act of prostitution. I wouldn't call it."

It is apparent from her answer that she was at a loss to classify her relationship with this man, therefore, it was necessary for the plaintiff to ask her if she had intercourse and was the intercource for money. In Pl. Ex. 2, page 56, she gave the following answers:

> "Q. During the entire time you lived on 11th North, did you perform any acts of prostitution?
>
> A. Well, I saw this friend of mine a few times.
>
> Q. Well, was that for the purpose of having sexual intercourse for money?
>
> A. Well, sometimes I would see him, and we didn't have sexual intercourse. We were friends.
>
> Q. Sometimes did you?
>
> A. Yes.
>
> Q. Was that for money?
>
> A. I don't know how you would want to class that. He has loaned me a great deal of money during the years."

And on page 57, Pl. Ex. 2:

> "Q. Did you perform any acts of prostitution?

A. Well, I saw this friend of mine a couple of times, I think, while I was living there, if I remember right.

Q. Is this the same individual you referred to earlier?

A. Yes.

Q. Is it your testimony, then, that the entire time after you came back to Seattle, in September, 1954, you only had sexual intercourse for money with one person?

A. Yes."

And on page 62 (Pl. Ex. 2):

"Q. During any period between 1952 and 1956, that you have been in Seattle, Florence, did you ever perform any acts of prostitution at the Washington Athletic Club?

A. This friend of mine worked at the Washington Athletic Club.

Q. Did you perform any acts of prostitution at the Washington Athletic Club?

A. I have met a couple of friends of mine there, yes.

Q. For purposes of having acts of sexual intercourse?

A. Yes."

And on page 63 (Pl. Ex. 2):

"Q. Did you, during this period between 1952 and 1956, when you were in Seattle, perform any acts of prostitution at the St. Regis Hotel?

A. Yes."

And on page 64 (Pl. Ex. 2):

"Q. During this entire period from 1952 until 1956, Florence, did you ever give any of the money that you received for acts of sexual intercourse to Frank Umbriaco?

A. No.

Q. Did you ever turn over any of the earnings you made as a prostitute to him?

A. No. I have paid bills and things."

I submit that defendant, in her testimony, has admitted practicing prostitution within the period set forth in Count II and that under the holding of *Smith v. U. S.*, 169 F 2d 118, pg. 121, "There can be no lawful conviction in a perjury case when an answer of the defendant under oath to a question propounded to him is literally accurate, technically responsive, or legally truthful."

Hart v. U. S., 9 Cir., 131 F 2d 56, 71;

Fotie v. U. S., 8 Cir., 137 F 2d 831, 840;

U. S. v. Slutzky, 3 Cir., 79 F 2d 504, 505;

Allen v. U. S., 4 Cir., 194 F 644, 668.

In *U. S. v. Rose*, 215 F 2d 617, 622:

"Perjury is the willful, knowing and giving under oath, of false testimony material to the issue or point of inquiry. An essential element is that the defendant must have acted with a criminal intent —he must have believed that what he swore to was false and he must have intent to deceive. If there

was lack of consciousness of the nature of the statement made or it was inadvertently made, or there was a mistake of the import, there was no corrupt motive."

ARGUMENT

Assignments II and III.

There has been no direct proof of some element of the crime for which the defendant has been tried and the verdict is contrary to law and evidence.

The charge placed the burden on the plaintiff below to prove that the testimony given by the appellant (Pl. Ex. 2) was false beyond a reasonable doubt by positive and direct evidence of one witness and corroborating circumstances.

The law is clear and universal that to convict the defendant of the charge of perjury, the Government has the burden of proving by direct and positive evidence of two witnesses or by one witness and corroborating evidence the falsity of the defendant's testimony, and the corroborating evidence must independently establish the falsity of defendant's testimony. Circumstantial evidence alone is insufficient to sustain a conviction of perjury.

In *Radomsky v. United States* (Seattle case) 180 F 2d 781, the court held, on page 782:

"in order to sustain a conviction of perjury, there

must be direct and positive evidence of the falsity of the statement under oath, and that circumstantial evidence of such falsity, no matter how persuasive, was insufficient."

On page 783, the court further stated:

"Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a circumstance is usually present when another certain circumstance or set of circumstances is present.

"Direct evidence establishes the fact to be proven without necessity for such inference."

In *People v. O'Donnell,* 132 CA 2d 840, 283 Pac. (2) 714, page 717 is stated:

"Perjury requires a higher measure of proof than any crime known to the law. . . . "

In *Spaeth v. U. S.,* 218 Fed. (2) 361, the court held:

"Falsity cannot be proved by circumstantial evidence alone nor by the uncorroborated testimony of one witness.

"The rule requiring the evidence of two witnesses for a conviction was designed to make convictions for perjury more difficult to obtain than in the case of most crimes."

In *Cuesta v. United States,* 230 F. (2d) 704, the court held:

"It is general rule that to authorize conviction for perjury, falsity of statement alleged to have been made by defendant must be established either by testimony of two independent witnesses, or by

one witness and by independent corroborating evidence which is inconsistent with innocence of the accused.

"A conviction for making false statements under oath requires evidence in addition to extra judicial admissions of defendant as to statement's falsity."

In *Dato v. United States,* 223 F. 2d 309, the court held:

"Perjury cannot be proved by uncorroborated testimony of one witness, since falsity of one person's oath cannot be established by another person's oath alone."

In *United States v. Neff,* 212 F. (2d) 297, the court held:

"Where the government seeks to establish perjury by testimony of one witness and corroborating evidence, such evidence must be independent of witness testimony and inconsistent with innocence of the defndant.

"Evidence Aliunde is evidence which tends to show perjury independently." (See also *U. S. v. Rose,* 215 F. 2d 617).

On page 306, the court held:

"In prosecution for perjury the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant. The falsity must be evidenced by the testimony of two independent witnesses or one witness and corroborating evidence, and in absence of such proof the defendant must be acquitted. *To sustain a conviction of perjury, the evidence must be strong, clear, convincing and direct."*

The rule has been approved and affirmed by the Su-

preme Court of the United States in *Weiler v. U. S.,* 323 U.S. 606, where the case of *Allen v. U. S.* (CCA 5) 194 F 664, 39 LR.A. (NS) 385, is cited and approved, also in *Hammer v. U. S.,* 271 U.S. 620, and in *U. S. v. Wood,* 14 Pet. 430, 10 L.Ed. 527. It is universal in all our Federal Courts.

The legal question therefore is to be answered by the application of the rule in perjury to the testimony and evidence admitted to prove the *factum probandum.* If the subject matter has been proved by direct and positive evidence, the requirements of the law have been met. If it does not measure up to the requirements of the rule, the plaintiff has failed and as was stated in *U. S. v. Otto,* 54 F (2d) 227 (CCA 2):

> "The subject matter was susceptible of direct proof although we may well assume that no such proof was obtainable. Inability or failure for any reason to produce it at this trial left a charge capable in its nature of being proved by direct and positive evidence wholly unproved by such evidence and so unproved as a matter of law."

Direct evidence being absolutely necessary to prove guilt in a perjury case and circumstantial evidence standing alone being insufficient to convict, then we must analyze what is direct and what is circumstantial and the distinction between the two.

20 Am. Jur. 1071, Sec. 1218:

> "The advantage of positive evidence is that *it is the direct testimony of a witness to the fact to be proved,* who, if he speaks the truth, *saw* and *heard* the transaction; and the only question is whether he is entitled to belief." (Emphasis ours)

Wigmore in his commentaries on evidence, Vol. 1, page 399, Sec. 25:

> "As a matter of course and from necessity, all judicial evidence must be either direct or circumstantial. When we speak of a fact as established by direct or positive evidence, we mean that it has been testified to by witnesses as having come under the cognizance of their senses and of the truth of which there seems to be no reasonable doubt or question; and when we speak of a fact as established by circumstantial evidence, we mean that the existence of it is fairly and reasonably to be inferred from other facts in the case."

When the above-stated principles are applied, it is defendant's contention that the testimony was insufficient to sustain the conviction, and she is entitled to a verdict of acquittal.

The only witness who testified that he had sexual intercourse for money with the defendant during the period stated in Count II was Gail Gordon Campbell. This relationship was admitted by the defendant. So defendant is faced with a charge of perjury on the testimony of one witness and other witnesses whose evidence

was not relevant to or corroborative in any respect to Campbell's testimony. The evidence of the bellmen is purely circumstantial. None of them saw defendant perform acts of sexual intercourse, none of them saw defendant receive money from any man, none of them gave her money to perform an act with anyone, and none of them knew definitely the time. The other evidence produced was evidence of the agents for the Federal Bureau of Investigation, showing that the defendant had admitted to them of being a call girl prostitute. The evidence of the bellmen and the F.B.I. agents was an attempt by the plaintiff to comply with the one witness rule plus corroborating evidence. Is this corroborative evidence under the rule? "When the court speaks of corroborative evidence, they mean *evidence* aliunde —evidence which tends to show perjury independently."

McWhorter v. U. S., 5 Cir., 193 F 2d 982, 985;
United States v. Hiss, 2 Cir., 185 F 2d 822;
United States v. Neff, 3 Cir., 212 F 2d 297, 307.

The corroborative evidence did not independently establish the perjury charged. The mere going to a hotel room on the call of a bellman does not establish prostitution.

> "Evidence tending to establish the probability of conduct is not enough; more than that is required; the path from the corroborating evidence must lead directly to the inevitable — not merely probable—conclusion of falsity."
>
> *U. S. v. Neff, supra.*

The testimony of the F.B.I. agents is controlled by the ruling in the case of *Hart v. U. S.,* 131 F 2d 59, 61:

> "These statements attributed to appellant were not made under oath, while her statements to the Internal Revenue agent and in open court were under oath. In view of the strong presumption of innocence, and because of the solemnity of the oath, credit must be given to what the defendant said under oath, rather than to what 'she' may have said to the contrary when not under oath." *Clayton v. U. S.,* 284 Fed. 540.

CONCLUSION

The Government's evidence in this case is wholly insufficient to meet the stringent rules required in a perjury case.

Therefore, the verdict should be set aside and judgment of acquittal rendered.

Respectfully submitted,

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